Re Perdana Merchant Bankers Bhd

HIGH COURT (JOHOR BAHRU) — COMPANIES (WINDING-UP) NO 28–34 OF 1992
ABDUL MALIK ISHAK J
14 MAY 1997

Companies and Corporations *— Winding up — Proceedings against company — Leave to continue proceedings — Whether leave is needed before proceedings can be instituted against wound up company — Companies Act 1965 s 226(3)(a)*

Companies and Corporations *— Winding up — Distribution of company's property — Whether application for distribution was premature — Priority of claims — Companies Act 1965 ss 292 & 293*

Companies and Corporations *— Winding up — Liquidators — Remuneration — Whether remuneration fixed by committee of inspection was valid — Companies (Winding-up) Rules 1965 r 142(1)*

The applicant ('Perdana') was the secured creditor of Campall Industries Sdn Bhd ('Campall') by virtue of two loan and credit facility agreements secured by legal charges over Campall's land and floating charges over Campall's other assets and undertakings. In 1992, Campall failed to fulfill its repayment obligations. Therefore, notices of default and crystallization were sent to it by Perdana. On 20 March 1993, Campall was wound up upon the petition of Panda International Co (Pte) Ltd. However, on 5 March 1993, in an attempt to satisfy the debt owed to Perdana, Campall had entered into an agreement with Jamuri Sdn Bhd ('Jamuri') to sell the land and machinery belonging to Campall with the consent of Perdana. Perdana then applied to the High Court for an order to validate the sale. The application was allowed but no ruling on the priority of distribution was made. However, Jamuri failed to complete the sale. This resulted in the forfeiture of the deposit of RM600,000 paid by Jamuri under the agreement. The assets of Campall were eventually sold by the liquidator to SPI Plastic Industries Sdn Bhd on 2 April 1996 ('the SPI sale') with the consent of Perdana. Thereafter Perdana requested the liquidator to apply to the court for directions as to distribution of the proceeds of the SPI sale. The requests were ignored by the liquidator. Hence, Perdana applied to the court for orders, inter alia, that the proceeds of the SPI sale, the interest earned under the fixed deposit account, the forfeited deposit and the rent collected from the charged land be paid out to them. Further, Perdana had also disputed the amount payable as the liquidator's remuneration.

The liquidator resisted the application and raised preliminary objections that: (i) leave of the court was not obtained by Perdana in the present application; (ii) the application was premature; (iii) Perdana's entitlement was only to the proceeds of the SPI sale after deducting the proper expenses and disbursement incurred. The

forfeited deposit, rent and interest earned were not part of the proceeds of the SPI sale and Perdana's claim to them would only rank pari passu with other creditors; and (iv) the liquidator's remuneration as fixed by the committee of inspection was valid.

Held, allowing the liquidator's preliminary objection and dismissing the application:

(1) Under s 226(3)(a) of the Companies Act 1965 ('the Act'), a proceeding shall not be instituted against any company after the winding-up order has been made except with leave of the court. Since no leave was obtained by Perdana, the application must necessarily be struck out (see p 453F); *Keating v Graham* (1895) 26 OR 361, *Howe v McDougall Ltd* (1939) 13 WCR (NSW) 33, *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204, *Re Waterloo Life Insurance Co (No 2)* (1862) 31 Beav 586, *Deutsche Bank v SP Kala* (1990) 67 Com Case 474 and *Re Burnells Pty Ltd (In liquidation), ex p Brown and Burns (liquidators); Burnells Pty Ltd (In liquidation) v Walsh* 4 ACLC, SC (Qld) 4 June 1979 followed.

(2) The affairs of the company must be tidied up before the issue of distribution under s 292 or 293 of the Act could be addressed by the liquidator. The filing of the application by Perdana was thus premature since matters concerning income tax, Socso and EPF had not yet been resolved.

Further, by virtue of s 292(1)(f) of the Act, s 75(2) of the Income Tax Act 1967 and s 10 of the Government Proceedings Act 1956, federal tax would have priority over secured creditors. Under the Employees Provident Fund Act 1991, EPF payments must also be given priority. Therefore, Perdana's claim was subjected to the interest of the preferential creditors and the liquidator had rightly given priority to them (see pp 461I, 462A–I and 463A–H); *Anuarul Aini v Ketua Pengarah Kastam dan Eksais Diraja Malaysia* [1991] 1 MLJ 360, *Global Pacific Textile Industries Sdn Bhd v Ketua Pengarah Kastam dan Eksais* [1994] 3 MLJ 175, *Chuah Teong Hooi & Anor v Employees Provident Fund Board* [1990] 2 MLJ 218 and *Re Golden Palace Musical Hall Sdn Bhd* [1988] 2 MLJ 634 followed.

(3) The liquidator's remuneration was fixed by the committee of inspection which derived its power from r 142(1) of the Companies (Winding-up) Rules 1972. Therefore, the liquidator was entitled to RM177,232.83 as claimed unless there was misconduct or the assets were insufficient to meet his remuneration or his appointment was defective (see pp 465H–I and 466A–C).

Obiter:

In an application for leave, the court would need to consider on the balance of convenience whether leave to proceed should be granted.

The court would also need to consider the seriousness of the claim, the degree of complexity of issues involved and the stage which the proceedings had reached (see p 458F–H); *Century Mercantile Co v Auckland Provincial Fruitgrowers Society* (1921) NZLR 272, *Re Queensland Mercantile Agency Co* (1888) 58 LT 878, *Stewart v Intercity Distributors Ltd* (1960) NZLR 944, *Maker v Taylor* (1984) 8 ACLR 931 and *Ogilvie-Grant v East* (1983) 1 ACLC 742 followed.

[Bahasa Malaysia summary

Pemohon ('Perdana') merupakan si piutang bercagar Campall Industries Sdn Bhd ('Campall') menerusi dua perjanjian kemudahan pinjaman dan kredit yang dijamin melalui gadaian ke atas tanah Campall dan caj terapung atas aset dan akujanji lain Campall. Dalam tahun 1992, Campall gagal memenuhi obligasi membayar balik. Oleh yang demikian, notis keingkaran dan penghabluran dihantar kepadanya oleh Perdana. Pada 20 Mac 1993, Campall digulung atas petisyen Panda International Co (Pte) Ltd. Namun demikian, pada 5 Mac 1993, dalam percubaan untuk menjelaskan hutang kepada Perdana, Campall telah mengikat suatu perjanjian dengan Jamuri Sdn Bhd ('Jamuri') untuk menjual tanah dan mesin kepunyaan Campall dengan persetujuan Perdana. Perdana kemudiannya memohon kepada Mahkamah Tinggi untuk suatu perisytiharan bagi mengesahkan jualan itu. Permohonan dibenarkan tetapi tiada keputusan atas keutamaan pembahagian telah dibuat. Walau bagaimanapun, Jamuri gagal menyempurnakan jualan. Ini mengakibatkan perampasan deposit sebanyak RM600,000 yang dibayar oleh Jamuri di bawah perjanjian. Aset Campall akhirnya dijual oleh penyelesai kepada SPI Plastic Industries Sdn Bhd pada 2 April 1996 ('jualan SPI') dengan keizinan Perdana. Selepas itu Perdana meminta penyelesai supaya memohon kepada mahkamah untuk arahan mengenai pembahagian hasil jualan SPI. Permintaan itu tidak diendahkan oleh penyelesai. Oleh itu, Perdana memohon kepada mahkamah untuk perintah, antara lain, bahawa hasil jualan SPI, faedah yang diperolehi di bawah akaun simpanan tetap, deposit yang dirampas dan sewa yang dikutip daripada tanah yang dicagar dibayar kepada mereka. Selanjutnya, Perdana juga telah mempertikaikan amaun yang harus dibayar sebagai ganjaran penyelesai.

Penyelesai menentang permohonan dan membangkitkan bantahan permulaan bahawa: (i) kebenaran mahkamah tidak diperolehi oleh Perdana dalam permohonan ini; (ii) permohonan adalah pramasa; (iii) hak Perdana cuma terhad kepada hasil jualan SPI selepas menolak perbelanjaan dan pembayaran wajar yang ditanggung. Deposit yang dirampas, sewa dan faedah yang diperolehi tidak merupakan sebahagian daripada hasil jualan SPI dan tuntutan Perdana kepadanya hanya setara pari passu dengan si piutang lain; dan (iv) ganjaran penyelesai seperti yang ditetapkan oleh jawatankuasa pemeriksaan adalah sah.

Diputuskan, membenarkan bantahan permulaan penyelesai dan menolak permohonan: A

(1) Di bawah s 226(3)(a) Akta Syarikat 1965 ('Akta tersebut'), tiada prosiding hendaklah dimulakan terhadap mana-mana syarikat selepas perintah penggulungan telah dibuat kecuali dengan kebenaran dari mahkamah. Oleh kerana tiada kebenaran telah diperolehi oleh Perdana, permohonan mestilah dibatalkan (lihat ms 453F); *Keating v Graham* (1895) 26 OR 361, *Howe v McDougall Ltd* (1939) 13 WCR (NSW) 33, *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204, *Re Waterloo Life Insurance Co (No 2)* (1862) 31 Beav 586, *Deutsche Bank v SP Kala* (1990) 67 Com Case 474 dan *Re Burnells Pty Ltd (In liquidation), ex p Brown and Burns (liquidators); Burnells Pty Ltd (In liquidation) v Walsh* 4 ACLC, SC (Qld) 4 June 1979 diikut. B C

(2) Urusan syarikat mestilah dikemaskan sebelum isu pembahagian di bawah s 292 atau 293 Akta tersebut boleh dikemukakan oleh penyelesai. Dengan itu, pemfailan permohonan oleh Perdana adalah pramasa kerana perkara-perkara berhubung dengan cukai pendapatan, keselamatan sosial pekerja dan KWSP belum lagi diselesaikan. D

Selanjutnya, disebabkan s 292(1)(f) Akta tersebut, s 75(2) Akta Cukai Pendapatan 1967 dan s 10 Akta Prosiding Kerajaan 1956, cukai persekutuan mempunyai keutamaan atas si piutang bercagar. Di bawah Akta Kumpulan Wang Simpanan Pekerja 1991, bayaran KWSP mesti juga diberikan keutamaan. Oleh itu, tuntutan Perdana adalah tertakluk kepada kepentingan si piutang keutamaan dan penyelesai dengan betulnya telah memberikan keutamaan kepada mereka (lihat ms 461I, 462A–I dan 463A–H); *Anuarul Aini v Ketua Pengarah Kastam dan Eksais Diraja Malaysia* [1991] 1 MLJ 360, *Global Pacific Textile Industries Sdn Bhd v Ketua Pengarah Kastam dan Eksais* [1994] 3 MLJ 175, *Chuah Teong Hooi & Anor v Employees Provident Fund Board* [1990] 2 MLJ 218 dan *Re Golden Palace Musical Hall Sdn Bhd* [1988] 2 MLJ 634 diikut. E F G

(3) Ganjaran penyelesai ditetapkan oleh jawatankuasa pemeriksaan yang memperolehi kuasanya daripada k 142(1) Kaedah-Kaedah (Penggulungan) Syarikat 1972. Maka, penyelesai berhak kepada RM177,232.83 seperti yang dituntut melainkan terdapat salah laku atau aset tidak mencukupi untuk memenuhi ganjarannya atau pelantikannya adalah cacat (lihat ms 465H–I dan 466A–C). H

Obiter:

Dalam permohonan untuk kebenaran, mahkamah perlu mempertimbangkan atas imbangan kemudahan sama ada kebenaran untuk meneruskan tindakan patut diberikan. Mahkamah juga perlu mempertimbangkan keseriusan tuntutan, darjah kerumitan isu-isu yang terlibat dan tahap prosiding yang tercapai (lihat ms 458F–H); I

Century Mercantile Co v Auckland Provincial Fruitgrowers Society (1921) NZLR 272, *Re Queensland Mercantile Agency Co* (1888) 58 LT 878, *Stewart v Intercity Distributors Ltd* (1960) NZLR 944, *Maker v Taylor* (1984) 8 ACLR 931 dan *Ogilvie-Grant v East* (1983) 1 ACLC 742 diikut.]

Notes

For cases on proceedings against a company, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 862–864.

For a case on distribution of company's property, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) para 658.

For cases on liquidators, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 745–766.

Cases referred to

AE Goodwin Ltd v AG Healing Ltd (1979) 7 ACLR 481 (refd)

Allison Johnson & Foster Ltd, Re [1904] 2 KB 327 (refd)

Anuarul Aini v Ketua Pengarah Kastam dan Eksais Diraja Malaysia [1991] 1 MLJ 360 (folld)

Bensa Sdn Bhd v Malayan Banking Bhd [1993] 1 MLJ 119 (refd)

Boulton v Nathan Nominees Pty Ltd & Anor (1992) 10 ACLC 1102 (refd)

Burnells Pty Ltd (In liquidation) ex p Brown and Burns (liquidators); Burnells Pty Ltd (In liquidation) v Walsh, Re 4 ACLC, SC (Qld) 4 June 1979 (folld)

Century Mercantile Co v Auckland Provincial Fruitgrowers Society (1921) NZLR 272 (folld)

Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow [1995] 3 MLJ 204 (folld)

Chuah Teong Hooi & Anor v Employees Provident Fund Board [1990] 2 MLJ 218 (folld)

Crawford (as liquidator of Action Waste Collections Pty Ltd) (In liquidation) v Greater Pacific General Insurance, Re (1983) ACLC 518 (refd)

Daemar & Anor v Opeskin & Ors (1985) 3 ACLC 743 (refd)

Deutsche Bank v SP Kala (1990) 67 Com Case 474; (1992) 74 Com Cases 577 (folld)

Eastern Holdings Establishment of Vaduz v Singer & Friedlander Ltd (Able Securities Ltd, In liquidation First Claimant; Sempah (Holdings) Ltd, Second Claimant) [1967] 2 All ER 1192 (refd)

Global Pacific Textile Industries Sdn Bhd v Ketua Pengarah Kastam dan Eksais [1994] 3 MLJ 175 (folld)

Golden Palace Musical Hall Sdn Bhd, Re [1988] 2 MLJ 634 (folld)

Gooch's case (1872) 7 Ch App 207 (refd)

Great Eastern Electric Co, Re [1941] 1 All ER 409 (refd)

HE Kingdon v SC Goho, Re [1948] MLJ 17 (refd)

Howe v McDougall Ltd (1939) 13 WCR (NSW) 33 (folld)

Keating v Graham (1895) 26 OR 361 (folld)

Kling Constructions Ltd, Re (1961) QWN 30 (refd)

Kumarasamy v Hj Daud [1972] 2 MLJ 16 (refd)
Kyra Nominees Pty Ltd, Re (1980) 5 ACLR 60 (refd)
Maker v Taylor (1984) 8 ACLR 931 (folld)
Markcon Sdn Bhd v Resilient Construction Sdn Bhd [1993] 3 MLJ 429
Massey, Re; Re Freehold Land & Brickmaking Co (1870) LR 9 Eq 367 (refd)
Mosbert Bhd (In liquidation) v Stella D'Cruz [1985] 2 MLJ 446 (refd)
Murray v United Pacific Transport Ltd (1960) QWN 20 (refd)
Nationwide News Pty Ltd v Samalot Enterprises Pty Ltd (1986) 4 ACLC 386 (refd)
New Zealand Times Co, Re (1941) NZLR 677 (refd)
Niemann v Commissioner for Corporate Affairs (1985) VR 147 (refd)
Ogilvie-Grant v East (1983) 1 ACLC 742 (folld)
Queensland Mercantile Agency Co, Re (1888) 58 LT 878 (folld)
Raja Arshad bin Raja Tun Uda & Anor v Director-General of Inland Revenue [1990] 1 MLJ 106 (refd)
Sanitary Burial Association, Re [1900]2 Ch 289 (refd)
Seymour & Anor v Southern Districts Video Pty Ltd (In liquidation) (1985) 3 ACLC 420 (refd)
Stewart v Intercity Distributors Ltd (1960) NZLR 944 (folld)
Sydney Formworks Pty Ltd (In liquidation), Re (1965) NSWR 646 (refd)
Thompson v Mulga Irrigation Co (1894) 4 BC (NSW) 53 (refd)
Walker, Ex parte (1982) 6 ACLR 423 (refd)
Wanzer Ltd, Re [1891] 1 Ch 305 (refd)
Waterloo Life Insurance Co (No 2), Re (1862) 31 Beav 586 (folld)
Wm Rose & Co, Re (1897) 3 ALR (CN) 65 (refd)

Legislation referred to

Companies Act 1965 ss 176, 183(3), 226(3)(a), 233, 236(3), 236(1)(a), (c), 242(1), 273, 292(1)(f)
Companies (Winding-Up) Rules 1972 r 142(1)
Employees Provident Fund Act 1991
Government Proceedings Act 1956
Income Tax Act 1967 ss 4(c), 75(2), (3)

Sitpah Selvaratnam (*Skrine & Co*) for the applicant.
Tan Chee Keong (*CK Tan & Co*) for the liquidator.

Abdul Malik Ishak J: By way of a notice of motion in encl 44, the applicant sought the following orders:

(1) that the applicant be paid the proceeds of the sale to SPI Plastic Industries (M) Sdn Bhd by the abovenamed company ('Campall') under the sale and purchase agreement dated 18 October 1994 of the land held under HS (D) 9697 PTD 1494 Mukim of Linau, Batu Pahat, Johor ('the land') and the building thereon in the sum of RM2m and interest accruing thereon;

(2) that the applicant be paid the proceeds of the sale of machinery to SPI Plastic Industries (M) Sdn Bhd by Campall under the sale and purchase agreement dated 18 October 1994 in the sum of RM50,000 and interest accruing thereon;

(3) that the applicant be paid the sum of RM600,000 received by Campall from Jamuri Sdn Bhd under a sale and purchase agreement dated 5 March 1993 and the interest accruing thereon;

(4) that the applicant be paid the sum of RM119,985.60 received by Campall as rental for the use of the land and the building thereon and interest accruing thereon;

(5) that the applicant be paid all monies belonging to Campall held in and/or accruing from accounts maintained by Campall with financial institutions;

(6) that the applicant be paid out of all other assets of Campall the balance of the debt owing from Campall to the applicant amounting to RM5,217,779 as at 15 July 1996 and increasing at a rate of 12.48% per annum calculated on a daily basis;

(7) that the costs of this application be paid out of the assets of Campall, if any, upon satisfaction of the above;

(8) alternative to prayers (1) to (7) above, that this Honourable Court hereby determines the priority of payment of the liabilities of Campall from the assets of Campall; and

(9) such further and other order as this Honourable Court deems fit.

In support of encl 44, Ong Meng Teck affirmed an affidavit in encl 43 on 28 August 1996. Enclosure 43 makes for interesting reading. The facts distilled from encl 43 may be stated thus. Campall is the debtor of the applicant one Perdana Merchant Bankers Bhd ('Perdana'), formerly known as 'Intradagang Merchant Bankers Bhd'. As at 15 July 1996, Campall owed RM5,217,779 to Perdana for banking facilities granted by the latter to the former pursuant to two loan and facility agreements dated 6 September 1989 ('the first agreement') and 18 October 1990 ('the second agreement').

Under the first agreement, Campall was granted a revolving credit facility up to a limit of RM1m and was allowed banker's acceptance facility to an aggregate principal limit of RM500,000. The facilities provided under the first agreement were secured against a fourth legal charge over the land and against a first fixed and floating charge over all of Campall's existing and future assets and undertakings excluding the land and building thereon, by way of a debenture dated 6 September 1989 ('the first debenture').

By the second agreement, Campall was extended an additional revolving credit facility and banker's guarantee facility with a combined maximum aggregate principal amount of RM1.6m. The banking facilities under the second agreement were secured against a second legal charge over the land and a second fixed and floating charge over all of Campall's assets and undertaking, present and future excluding the land and building thereon. It is interesting to note that the charges created pursuant to the

first agreement and the second agreement were duly registered in accordance with the National Land Code 1965 ('the NLC') and the Companies Act 1965 ('the Act'). A

On 30 November 1992, a notice of default was sent by Perdana to Campall, inter alia, in respect of Campall's failure to fulfil its repayment obligation and immediate repayment of all sums outstanding under the first and second agreements. Soon thereafter, on 8 December 1992 a notice of crystallization of all assets and properties subject to the charge under and in accordance with the provisions of the first and second debentures was sent to Campall by Perdana. With the consent of Perdana, Campall acting through its directors entered into an agreement with Jamuri Sdn Bhd ('Jamuri') on 5 March 1993 for the sale and transfer of the land, the building thereon ('the immovable property') and specific machinery belonging to Campall ('machinery') in an attempt to satisfy the debt owing to Perdana. In consideration of the sale of the immovable property and machinery, Jamuri agreed to pay the sum of RM2.5m which comprised RM1.6m for the price of the immovable property and RM900,000 for the price of the machinery. Upon the presentation of a petition by Panda International Co (Pte) Ltd ('Panda'), my predecessor's predecessor ordered Campall to be wound up on 20 March 1993. This prompted Perdana to apply for leave of the court under s 223 of the Act to validate the sale agreement entered between Campall and Jamuri on 5 March 1993. That validation application was heard on 2 December 1993, where James Foong J validated the sale agreement and reserved his decision in regard to the payment of the proceeds of sale under that sale agreement. On 22 January 1994, James Foong J ordered that the proceeds of sale, if any, of the immovable property and the machinery thereof be paid to the liquidator of Campall ('the liquidator') for its placement in an interest-bearing fixed deposit account to be maintained by the liquidator until further order of the court on the priority of distribution thereof. It is significant to note that Perdana and the liquidator thereafter arrived at an agreement on the terms of the placement of the proceeds for sale in a fixed deposit account. In due course, the liquidator acting through his solicitors Messrs Ong Ban Chai & Co and Perdana through their solicitors Messrs Skrine & Co arrived at an agreement on the quantum to be paid to the liquidator by Perdana as costs of the validation application. Unfortunately, that sale agreement was not completed by reason of the default of Jamuri. On 8 March 1994, the liquidator and Perdana, acting through Messrs Skrine & Co, accepted the repudiation by Jamuri and terminated the sale agreement. This resulted in the deposit of RM600,000 paid by Jamuri under the sale agreement to be forfeited and that forfeiture went to Campall as agreed liquidated damages for wrongful termination of the sale agreement by Jamuri. It was deposed that the immovable property and machinery were thereafter negotiated for sale through the efforts of both Perdana and the liquidator. On 14 June 1994, the liquidator wrote to Perdana and requested for the latter's formal consent to the sale of the immovable property and the machinery by the liquidator. By letter dated 3 August 1994, Messrs Skrine & Co wrote to the liquidator confirming B C D E F G H I

Perdana's consent to the sale of the immovable property and machinery to SPI Plastic Industries (M) Sdn Bhd ('SPI Plastic') at the price of RM2,050,000 subject to the payment of the proceeds of sale to Perdana as chargee of the immovable property and the machinery. On 18 October 1994, a sale and purchase agreement was executed between the liquidator and SPI Plastic ('the SPI sale'). It was deposed that the SPI sale was duly completed on or about 2 April 1996 and that the total purchase price of RM2,050,000 for the immovable property and the machinery was paid into the bank account of Campall maintained by the liquidator. Thereafter the liquidator provided Perdana with a statement of receipts and payments which included a list of anticipated payments out of the proceeds of sale of the immovable property and the machinery together with the other assets of Campall. There was an exchange of letters between the liquidator and Perdana on 12 February 1996 and 15 February 1996 which finally culminated in the letter dated 16 February 1996, wherein Perdana requested the liquidator to proceed to apply to this court for directions in respect of the distribution of the sale proceeds of the immovable property and the machinery and of the other assets of Campall — all these have been charged to Perdana. In furtherance of that objective, on 27 May 1996 Messrs Skrine & Co wrote to Messrs CK Tan & Co, the solicitors for the liquidator with the appropriate details as to Perdana's right to the proceeds of sale of the immovable property and the machinery together with all the other assets of Campall charged to Perdana, without any deduction for payments towards the purported liabilities of Campall thereof. By the letter dated 27 May 1996, Perdana requested the liquidator to make the necessary application to the court for directions on the distribution of the proceeds of sale of the immovable property and the machinery together with Campall's other assets within 30 days thereof, in the event the liquidator held a contrary view. It was deposed that to date, Perdana had not been served with any application for referral to court by the liquidator for directions on the distribution of the assets of Campall. Instead, what was alarming to Perdana was that the liquidator transmitted requests to disburse payment of real property gains tax to the Inland Revenue from the assets charged to Perdana. In the circumstances and for these reasons, Perdana sought for the orders as set out in encl 44.

In rebuttal of encl 43, Ng Pyak Yeow ('Ng') affirmed an affidavit-in-reply on 25 October 1996 as reflected in encl 49. Ng was the duly appointed liquidator of Campall pursuant to an order of the Johor Bahru High Court dated 20 March 1993 vide Winding-Up Petition No 28–34–1992. In short, Campall was wound up on 20 March 1993 and Ng was appointed the liquidator. Prior to that winding up exercise, Campall had obtained banking facilities from Perdana under the loan agreement and facility agreement dated 6 September 1989 and 18 October 1989 respectively, these loans were secured by way of a land charge and a first and second debenture created over the land and assets of Campall. Events showed that Campall defaulted in their repayment and by a notice dated 8 December 1992 Perdana duly crystallized all the assets and properties of Campall. Notwithstanding the notice of crystallization dated 8 December

1992, Perdana saw it fit not to appoint receivers and managers to take over the assets but instead was quite content to place the affairs of Campall in the hands of its former directors. It was deposed that Perdana had not obtained leave of this court to commence the action as was required under s 226(3) of the Act. A point was advanced that although Perdana, Campall and Jamuri were aware that a winding-up petition had been filed by Panda on 24 March 1992 when they executed the sale and purchase agreement on 5 March 1993, yet they chose wilfully or otherwise to ignore that fact. After Campall was ordered to be wound up on 20 March 1993, validation proceedings were commenced with strong objections advanced by Ng. These objections were neatly put by Ng in an affidavit-in-reply exhibited and marked as exh NPY2 which can be compendiously stated as follows, ie that:

(1) the sale and purchase agreement entered on 5 March 1993 after the commencement of the winding up was said to be void under ss 223 and 293 of the Act together with s 53 of the Bankruptcy Act 1967;

(2) the assets of Campall may be divided into one fixed charge over the land and one under debenture on the machinery of Campall;

(3) under s 233 of the Act, Ng was duty bound to collect and realize the assets of Campall to pay the costs of the winding up and distribute to the preferential creditors first and thereafter under s 292(4) to the debenture holder;

(4) under s 238(2)(c) of the Act, Ng was empowered to sell the assets and pay the fixed chargee to the land and keep the surplus, if any;

(5) Ng may sell the machinery under the debenture and keep the money for distribution under s 292 of the Act and the debenture holder may take under s 292(4) of the Act; and

(6) under s 226(4) of the Act, a winding up order was meant for the benefit of all the creditors and shareholders — in such a situation, Campall could not sell the land and Perdana had no locus standi to validate the sale.

It was deposed that though the court had knowledge of Ng's position as the court-appointed liquidator, yet Perdana chose to ignore the existence of Ng and continued to deal with Jamuri directly without due regard to the statutory duties and obligations of Ng as a court-appointed liquidator. It was deposed that James Foong J held that Perdana was not entitled to make an application for validation of the sale of the properties of Campall to Jamuri pursuant to s 223 of the Act because Perdana as the chargee had not taken the relevant steps to realize their security under the charge created nor did Perdana appoint any receiver or manager to take the assets or, for that matter, to proceed with foreclosure proceedings to dispose of the immovable properties prior to the winding up of Campall. It was further deposed that James Foong J held that since Perdana had not realized their securities they could not bypass Ng as the court-appointed liquidator to the assets and properties of Campall as Ng was under a statutory duty to take into his custody and control all the properties which

Campall was or appeared to be entitled under s 233 of the Act. It was stressed that James Foong J after taking due cognizance of the fact that the sale between Campall as the vendor and Jamuri as the purchaser was to be completed one day after the hearing; and being persuaded by the fact that the price obtained was the best available and that an opportunity may be missed if the sale did not go through, ordered that the properties listed in the sale and purchase agreement be sold in those special circumstances and directed that the proceeds of sale be forwarded to Ng as the liquidator duly appointed under s 277(5) of the Act. James Foong J was said to have held the view that Ng as the court-appointed liquidator had the right to hold the proceeds of sale under s 233 of the Act and to apply the proceeds for distribution under ss 291 and 292 of the Act and that it was the responsibility of Ng to decide on the distribution and until there was a dispute as to the distribution between Ng as the liquidator and Perdana, the court would not make any other order other than those stated in the judgment. Ng deposed that since his appointment as the liquidator pursuant to the order of the court on 20 March 1993, he has adhered faithfully to the judgment of James Foong J, and had dutifully gone about discharging his statutory duties as the liquidator appointed under the provisions of the Act, particularly s 236(c) and (j) thereof and settling the affairs of Campall. Towards this end, Ng was said to have corresponded, attended to or dealt with matters related to or affecting Campall with the following personalities:

(a) the solicitors of Perdana who were the chargee;

(b) the directors of Campall;

(c) the various firms of solicitors that represented the petitioning creditor, supporting creditors, etc.

(d) the officers of the Inland Revenue Department, EPF, the labour department at Batu Pahat;

(e) the solicitors involved in the sale of the assets;

(f) the officers from the banks, security guard firms and all the other matters pertaining to Campall.

Ng confirmed that Messrs Skrine & Co had, on his behalf, terminated the sale agreement with Jamuri by letter dated 8 March 1994 and consequently forfeited the deposited sum of RM600,000 to the estate of Campall by reason of the failure of Jamuri to complete the sale. It was deposed that Ng had on 1 June 1994 advertised the assets of Campall, both the movable and immovable properties for sale in the two national daily newspapers, namely *The Star* and the *Nanyang Siang Pao*. As a result of that advertisement, Ng received several bids with the highest bidder from Messrs Darasutra (M) Sdn Bhd for RM2,050,000. Soon thereafter, with the formal consent of Perdana as the chargee, Ng executed the sale and purchase agreement of the sale of the assets of Campall with the nominee of the successful bidder, namely SPI Plastic. That sale was completed on 2 April 1996 when the balance of the purchase price of RM2,050,000 was paid to Ng and that money was then placed in the fixed deposit account. For these reasons Ng took the stand that the allegation that the sale was

negotiated through the efforts of Perdana and Ng as claimed by Perdana was totally untrue. Ng stressed that the sale was done through his own individual initiative and effort. In admitting para 16 of encl 43, Ng elaborated further and he deposed that:

(a) the proceeds from the sale of the assets charged to Perdana and then to SPI Plastic amounted to RM2,050,000.

(b) there were additional sums that accrued to Campall after the latter had been wound up, namely:

(i) the sum of RM636,265.22 being the deposit forfeited by Ng as a result of the failure of Jamuri to complete the sale;

(ii) the sum of RM119,985.60 being the rentals collected thereunder for the duration of 15 months at RM8,000 per month; and

(iii) the sum of RM177,709.06 being the interest accrued under the fixed deposit.

It was deposed that Perdana as the secured creditor under the said charges were entitled to the proceeds from the sale of the assets of Campall to SPI Plastic less the various expenditures incurred such as real property gains tax payable, the legal fees incurred for the transfer, the costs of advertisements, liquidator's fees and other sundry expenses incurred as of right by virtue of their position as the secured creditor. In regard to the other monies earned and/or accrued to Campall after the winding up amounting to RM933,959.88 (RM636,265.22 + RM119,985.60 + RM177,709.06 = RM933,959.88), it was Ng's stand that Perdana's claim ranked pari passu with the other creditors in accordance with ss 291 and 292 of the Act and not in priority over them. It was because of the dispute as to who should have priority to the sum of RM933,959.88 that the matter was referred by Perdana to this court for determination, so deposed Ng in his long affidavit-in-reply. It seemed that Perdana was even disputing Ng's remuneration as provided for under r 142(1) of the Companies (Winding-Up) Rules 1972 despite the fact that the committee of inspection had duly approved the remuneration package of RM177,232.83 by a resolution dated 2 July 1993. It was deposed that it was wrong for Perdana to insist that all monies accruing to Campall belonged to Perdana as this would run counter to the decision of James Foong J. It was deposed that though concerted explanations in writing were given to Perdana which included highlighting the relevant applicable sections of the Companies (Winding-Up) Rules 1972 as well as the clear and unequivocal decision of James Foong J, Perdana has wilfully, wrongfully and persistently refused to acknowledge:

(1) Ng's entitlement to the liquidator's fees as provided under the Companies (Winding-Up) Rules 1972;

(2) that Perdana as secured creditor was entitled to the proceeds of sale of the assets charged to them after deducting the proper expenses and disbursements incurred therein;

(3) that the shortfall of Perdana's claim (if any) would rank pari passu with the other creditors under ss 291 and 292 of the Act; and

(4) that the sum of RM933,959.88 which comprised the forfeited monies of RM600,000, rent received and interests earned from placing the monies in fixed deposits accrued to Campall did not constitute part of the proceeds from the sale of the secured assets of Perdana.

Ng deposed further that he was advised and believed that Perdana's application was misconceived and an abuse of the process of the court in that no leave had been obtained by Perdana from this court under s 226(3) of the Act before commencement of an action against Campall in liquidation. Perdana's actions were said to be premature, frivolous and vexatious as Ng had not completed nor discharged his statutory duties as the court-appointed liquidator under s 236(2)(j) of the Act. It was deposed that Perdana's action can be construed as wrongful interference in the due performance and/or discharge of Ng's duties as the court-appointed liquidator since Ng had not completed his assignment as a liquidator in the following areas:

(1) to pay the taxed costs of the petitioning creditor and the supporting creditors.

(2) to ascertain the tax liabilities payable on the interests accrued to the fixed deposits of Campall which was hotly disputed by Perdana.

It was deposed that Perdana's actions in these proceedings without leave of this court and without regard to the orders of James Foong J amounted to contempt of court. In the case of *Re HE Kingdon v SC Goho* [1948] MLJ 17 at p 18, Brown J said:

> 'Contempt of court' covers a wide range of omissions and commissions, from the failure to obey a judgment or order of the court to what Lord Hardwicke in *Re Read and Ruggonson* (1742) 2 Atk 291 at p 469, described as 'scandalizing the court itself'. The former is an example of what is known as ordinary contempt. The latter is special contempt. And within the category of special contempt come newspaper articles which tend to prejudice the fair trial of a case, and acts done or writings published which are calculated to bring a judge into contempt or to lower his authority. But the root principle on which this inherent power to punish for contempt is founded, and the purpose for which it must be exercised, is not to vindicate the dignity of the individual judge or other judicial officer of the court itself, but to prevent an undue interference with the administration of justice in the public interest.

In the context of the present case, it was the omission to obey the orders of James Foong J that was vehemently advanced before me.

Flowing from this, it was said that Perdana's conduct can be construed as vindictive, malicious, harassment and interference in the discharge of Ng's duties as the court-appointed liquidator. For these reasons, Ng sought for encl 44 to be dismissed with costs.

Baharuddin bin Hj Mohd Shariff ('Baharuddin') as the Vice-President of Perdana affirmed a third affidavit for Perdana on 7 November 1996 as reflected in encl 50 and he deposed, upon being advised by Messrs Skrine & Co, that there was no necessity for Perdana to appoint receivers and managers over the assets charged by Campall in favour of Perdana, as the

petition to wind up Campall had been presented to court and the directors of Campall were precluded by the operation of law from disposing assets of Campall, save with the leave of court. It was deposed that the automatic crystallization of the floating charge into a fixed charge was sufficient to protect the interest of Perdana to ensure that Perdana obtained, in every way, priority in repayment of the debt owed by Campall to Perdana upon realization of the assets charged. Being advised by Messrs Skrine & Co, it was deposed that Perdana's notice of motion in encl 44 was not subject to s 226(3) of the Act as the motion was not a proceeding against Campall. It was said that the notice of motion was an application by a creditor of Campall to this court seized of the winding-up affairs of Campall, for directions on the distribution of assets realized in the winding-up of Campall. There was no wilful disregard of any court proceedings and the sale agreement between Campall (acting through its directors) and Jamuri was said to be expressly made conditional upon the validation by the court of the intended sale. It was deposed that Messrs Skrine & Co were named as the vendor's solicitors in the sale agreement and that sale agreement had been validated on 2 December 1993 by the court. It was said that Messrs Skrine & Co had also agreed to mention on behalf of the solicitors for Jamuri, namely Messrs CL Boo & Associates, at the hearing of the validation application. With this scenario in mind, correspondences continued to be exchanged between Messrs Skrine & Co and Messrs CL Boo & Associates despite the appointment of Ng as the liquidator for Campall. It was asserted that at no point of time did Perdana abandon or surrender to the liquidator the securities held by Perdana over the assets of Campall. The SPI sale executed by the liquidator was said to recognize Perdana's security over the properties subject to that sale. It was deposed that James Foong J made no finding on the priority of payment of the debts of Campall and his Lordship intended such priority to be determined by the court in the event of a dispute on the distribution of assets arising between Perdana and the liquidator. It was Perdana's stand that what was deposed in encl 49 showed that a dispute had arisen between Perdana and the liquidator especially in regard to the manner of distribution of the assets of Campall. It seemed that the liquidator had agreed with Perdana in January 1994 to apply to the court for directions in regard to the distribution of the assets of Campall upon receipt by the liquidator of the balance of the purchase price of the immovable property and the machinery. It was deposed that the balance of the purchase price of the SPI sale of the immovable property and the machinery was received by the liquidator on 2 April 1996. The abortive sale to Jamuri which resulted in the forfeiture of the deposit sum of RM600,000 was said to accrue to Perdana and not Campall. In any event, it was asserted that the first and second debentures created charges in favour of Perdana over all the assets of Campall, whether present or future. The monies received by the liquidator over the sale agreement were consequently said to be subject to Perdana's fixed charge. After the abortive sale agreement with Jamuri, an officer from Perdana by the name of Howard Choo Kah Hoe inspected the site of the immovable property and concurrently visited a few companies trading in and around the vicinity of the immovable property on or about May 1994. One such company was

A B C D E F G H I

SPI Plastic which expressed an interest in acquiring the immovable property and the machinery upon being informed that these assets were for sale. Perdana informed the liquidator of SPI Plastic's interest in purchasing the immovable property and the machinery. SPI Plastic was eventually substituted as the purchaser of the immovable property and the machinery upon the request of Darasutra (M) Sdn Bhd. A number of other offers for the purchase of the immovable property and the machinery were received by the liquidator prior to the liquidator's advertisement for the sale of these properties. Incidentally, these offers were also directed, by carbon copy, to Perdana. From these set of facts, Perdana held the view that the sale of these properties were the joint efforts of both Perdana and the liquidator. It was deposed that the rentals received by the liquidator came from the use of the immovable property that was charged to Perdana by SPI Plastic pending completion of the SPI sale whilst awaiting for the approval of the relevant authorities of that intended sale. It seemed that the immovable property was let to SPI Plastic with Perdana's consent and subject to Perdana's fixed charge over the rentals, as debts, received by Campall. It was said that Howard Choo Kah Hoe of Perdana negotiated with one Gan Kim Huat of SPI Plastic in respect of the amount of rental payable for the lease of the immovable property. Similarly, it was thought that the interest which accrued from the fixed deposit was interest derived from the monies which were subject to a fixed charge in favour of Perdana — an asset of Campall that was charged independently by reason of the first and second debentures. For these reasons, para 28 of encl 49 was denied. Perdana too denied that the proceeds of the SPI sale were subject to any prior claim, save for the costs and expenses involved in realizing the said proceeds and a proportion of the liquidator's remuneration earned by such realization. It was deposed that Perdana, as creditor of Campall, never received any notice of meetings held for the purpose of constituting a committee of inspection, nor was Perdana given an opportunity to vote on the remuneration of the liquidator. It was said, upon the advice of Messrs Skrine & Co, that such remuneration if validly approved by the committee of inspection could properly be paid out of the unsecured assets of Campall. Any remuneration to be deducted from the realization of secured assets must be determined by the court upon representation made by the secured creditor affected by such determination. At any rate, it was the assertion of Perdana that the quantum claimed by the liquidator pursuant to the scheme approved by the purported committee of inspection was inaccurate. It was said that for the purposes of calculating the liquidator's fee, those amounts that were realized together with the monies derived from the sale of assets charged to Perdana otherwise than under a debenture must be deducted. But since no amounts were available for distribution as dividend to other creditors of Campall, thus all sums realized less cost and expenses of realization were payable to Perdana as proceeds of Perdana's security. On this ground, it was said that the liquidator was not entitled to a separate set of remuneration in respect of the distribution. Perdana held the view that only the sum of approximately RM21,366.83 was payable to Ng — the liquidator — as his remuneration under the scheme approved by the purported committee of inspection.

Perdana also held the view that the notice of motion in encl 44 was not contrary to the decision of James Foong J. It was apparent from Ng's affidavit-in-reply in encl 49 that a dispute as to the proper distribution of the assets of Campall has arisen. Flowing from this, it was said that the notice of motion was timely as the only duties left to be discharged by Ng was simply to distribute the assets of Campall. Perdana also held the view that the liquidator had agreed to make an application to the court for directions on the distribution of assets but failed to do so despite repeated requests. The liquidator too did not inform Perdana prior to the filing of the notice of motion by Perdana that such motion was premature notwithstanding the fact that the liquidator had been informed in May 1996 of Perdana's intention to file the notice of motion. Adopting a peculiar stand it was said that the liquidator sought merely to pressure Perdana into allowing specific classes of payments to be made out of the assets of Campall without complying with the order of court dated 22 January 1994 granted by James Foong J. Finally, it was deposed that the liquidator by his own conduct had precluded himself from disputing the necessity of having the notice of motion to be determined by this court.

Ng affirmed a further affidavit-in-reply in encl 51 on 21 December 1996 and there he challenged the propriety of Baharuddin in affirming an affidavit in encl 50. Ng deposed that at all material times he dealt with one Ricky Cheng See Cheong, the then Vice-President of Perdana in charge of corporate banking as Baharuddin was not in the picture as yet until at the very last stage — sometime in June 1994 when by then, the sale had already been completed and the proceeds of sale had been handed to Ng by the order of court dated 22 January 1994. For that reason, Baharuddin was said not to be well-versed with the facts that had transpired and consequently he was not in a position to attest to it accordingly. Ng reiterated his previous stand as set out in encl 49 to the effect that Perdana was deemed to have abandoned their legal rights to dispose off the securities as Perdana had not taken any requisite action to realize the securities charged to them prior to the winding-up of Campall. Perdana was not entitled to priority in payment vis-a-vis the preferential creditors as defined in s 292 of the Act. Ng deposed that he was advised by his solicitors that Perdana's notice of motion was indeed a form of legal proceeding against Campall as that motion sought the requisite order of the court for Perdana to be paid the full proceeds of sale in priority over all the preferential creditors as defined in s 292 of the Act together with costs to be taxed. Ng reiterated that the notice of motion should be struck out forthwith for want of leave, a requisite requirement of s 226(3) of the Act. It was deposed that Perdana was well aware that the sale and purchase agreement between Perdana and Jamuri dated 5 March 1993 had been entered into after the commencement of the winding up and it was thus void under ss 223 and 293 of the Act read together with s 53 of the Bankruptcy Act 1967. Under s 233 of the Act, Ng was under a statutory duty to collect and realize the assets of Campall in order to pay the costs of the winding-up petition and thereafter to distribute the assets to all the creditors in the natural order of priority as set out in s 292 of the Act. It was deposed rather bluntly that Perdana knew that Ng, as the duly appointed liquidator of the court, had

A the requisite authority to sell the assets of Campall under s 326(2)(c) of the Act, yet Perdana had the audacity to bypass Ng and executed a sale and purchase agreement by appointing their own solicitors to conduct the sale. This was said to be a back door practice that was designed to undermine Ng as the court-appointed liquidator — a move calculated to
B circumvent the statutory provisions of the Act and the NLC. It was not disputed that Perdana as a debenture holder of Campall's assets under the debenture dated 6 September 1989, had a charge over Campall's assets including the factory. It was for this reason that Ng requested Perdana's formal consent when Ng sold the assets of SPI Plastic on 18 October 1994. Likewise Perdana recognized Ng as the proper person in law to conduct
C the sale of the assets on behalf of Campall who were the registered owners of the land. It was deposed that the monies forfeited from the abortive sale of the assets amounted to RM636,265.22 as at 30 September 1996 and it was not part of nor related to the charges affixed on Campall's assets. That being the case, Perdana was only entitled to the forfeited deposit as a secured creditor under their floating charge and, consequently, the
D preferential creditors as defined in s 292 of the Act take priority. It was for this reason that para 9 of encl 50 was said to be totally misconceived. Ng was categorical when he deposed that he had not met Howard Choo Kah Hoe in person nor was Ng aware of his existence. Ng said that he was never referred to Howard Choo Kah Hoe in the numerous meetings,
E telephone conversations and correspondences between Ng and Perdana's employees. Ng admitted that he went once to the factory with Ricky Cheong See Cheong together with Campall's directors and several other executives from the Arab Malaysian Group of companies — when the factory was sold to one of their subsidiaries — to take an inventory of the machinery and plants there. Ng denied that Perdana had informed him of
F SPI Plastic's interest in purchasing Campall's assets since there was no record of any letter or correspondence to that effect. Ng deposed that if there was such an interest being expressed as claimed, he would have immediately acted upon it. Ng denied vehemently in encl 51 that the factory was sold through the joint efforts of Perdana and himself; it was
G Ng's stand throughout that he was solely responsible for the sale of that factory. By way of an elaboration Ng, deposed that SPI Plastic did not tender for the factory. The successful tenderer for the factory was Darasutra Sdn Bhd who later requested that SPI Plastic be substituted in place of them. This was agreed to by Ng as Darasutra Sdn Bhd was part and parcel of the same group of company as SPI Plastic which in turn was part and
H parcel of the Arab Malaysian Consortium of Companies. It was deposed that SPI Plastic had approached Ng for the latter's permission to allow SPI Plastic to take possession of the factory whilst waiting for the requisite consent to sell from the state authority as the factory was on leasehold land. In the subsequent negotiations that ensued, SPI Plastic was
I represented by four persons including Dipak Kaur, a group company secretary of the Arab Malaysian group, SR Karthigasan, Ricky Cheong represented Perdana while Ng was accompanied by the solicitors of Campall, namely Allan Wong. Two former directors of Campall in the persons of Eng Sian Kuang and Sheng Cheng Yeng were also present. Ng deposed

that to the best of his recollection he could not recall whether Howard Choo Kah Hoe and Gan Kim Huat were present at the negotiations or even at the factory site. Ng deposed that the rentals received did not represent nor was it part of the fixed charge as alleged because James Foong J held that the properties were still the assets of Campall. Ng reiterated that the costs and expenses involved in realizing the proceeds of sale of the factory to SPI Plastic together with the liquidator's remuneration were to be categorized as real property gains taxes and should be payable to the Inland Revenue department. It was said that income tax was also payable and leviable on the interests earned from monies placed in fixed deposits and the liquidator should be given the duty of paying those taxes as it was he who had obtained the additional monies for distribution. The liquidator had acted prudently. He had taken steps to put into fixed deposit accounts the following: the proceeds of sale obtained from Perdana, the forfeited deposit sum, the rentals earned and the interests accrued thereto. These were said to be prudent moves as the interests earned would be used to settle the debts of Campall. Ng expressed surprise that Perdana did not receive any notice of the intended meeting for the setting up of the committee of inspection as such notice was advertised in *The Star* newspaper on 25 June 1993. On 2 July 1993, the committee of inspection met and approved Ng's remuneration as specified under Table 'C', Second Schedule of the Companies (Winding-Up) Rules 1972. It was deposed that the task of a liquidator can best be described as onerous and time consuming as voluminous records have to be kept and perused by the liquidator in the discharge of his duties. To date, it was deposed that the records kept by Ng had grown to be approximately 10–12 inches in height and was likely to grow even bigger when it would finally culminate in its dissolution upon an application to the court. Ng reiterated that the notice of motion was premature, frivolous and vexatious in view of the fact that he had not completed his assignment as a liquidator nor discharged his statutory duties under s 236(2) of the Act. It was said that the inland revenue department had not advised Ng as to the tax liabilities of Campall despite numerous reminders to them. Ng categorically deposed that he had not given any grounds, reasons or excuses for Perdana to believe that he would not be applying or refusing to apply to this court for directions as to the distribution of the assets of Campall. In the event Perdana was dissatisfied or aggrieved by Ng's decision in regard to the distribution of assets under s 292 of the Act, Perdana could come to the court to confirm, reverse, or modify the decision complained of under s 279 of the Act. The notice of motion was said to be a wrongful interference and oppression in the due performance of and the discharge of Ng's statutory duties as the court-appointed liquidator as it was filed with the ulterior motive of putting Ng under pressure and to deny Ng's remuneration package under the scale fees as prescribed by the Companies (Winding-Up) Rules 1972. Finally, it was deposed that the notice of motion was tantamount to harassment and unlawful interference of Ng's statutory duties as an officer of this court and it should summarily be dismissed with costs.

A B C D E F G H I

Mr Tan Chee Keong, an advocate and solicitor, affirmed an affidavit on 24 January 1997 as seen in encl 52 and there he enclosed the statement of accounts of Campall as at 7 January 1997 showing the balance to be paid to Perdana and the liquidator's fees.

Miss Sitpah Selvaratnam, an advocate and solicitor, affirmed an affidavit in encl 53 on 3 April 1997 and there she deposed to and annexed a letter dated 26 March 1997 from Campall to Perdana, a letter dated 19 March 1997 from Campall to the inland revenue department, a letter dated 1 April 1997 from Messrs Skrine & Co to Messrs CK Tan & Co and a letter dated 2 April 1997 from Messrs CK Tan & Co to Messrs Skrine & Co. These letters related to the income tax of Campall and adverted to the notice of motion in encl 44 filed by Perdana.

These rather long facts were purposely set out — a very tedious exercise — to show the chequered history of Campall which finally culminated in the filing of encl 44. Perdana through encl 44 sought several orders in their favour and the liquidator strenously challenged it. A preliminary objection was advanced by Mr Tan Chee Keong, learned counsel for the liquidator, to the effect that encl 44 was filed prematurely as the liquidator has not tidied up the affairs of Campall. I shall now proceed to consider the preliminary objections advanced by Mr Tan Chee Keong, not in its order of merit.

Leave of the court

Section 226(3)(a) of the Act in clear language sets out the requirement that an action or a proceeding shall not be proceeded with or commenced against the company after a winding up order has been made or a provisional liquidator has been appointed except by leave of the court. Campall was wound up on 20 March 1993. To validate the sale and purchase agreement dated 5 March 1993 between Campall and Jamuri, Perdana applied to the court to validate that sale and purchase agreement. On 12 December 1993, James Foong J validated that sale and purchase agreement. Enclosure 44 was filed on 4 September 1996 and all the affidavits filed therein in support of encl 44 did not show that leave was obtained under s 226(3)(a) of the Act.

An application for leave to proceed must be made by summons and served on the liquidator. Generally, leave should be obtained before commencing the proceedings but leave may be granted nunc pro tune in the case of proceedings instituted without leave (*Re Wanzer Ltd* [1891] 1 Ch 305 at p 315; *Thompson v Mulga Irrigation Co* (1894) 4 BC (NSW) 53; *Murray v United Pacific Transport Ltd* (1960) QWN 20; *AE Goodwin Ltd v AG Healing Ltd* (1979) 7 ACLR 481 at p 495 and *Re Sydney Formworks Pty Ltd (In liquidation)* (1965) NSWR 646). It must be remembered however that mere delay in applying for leave will not, in itself, prevent leave being granted because leave cannot be withheld simply and solely as a punishment (*Ex parte Walker* (1982) 6 ACLR 423). In the present case, it was not a question of delay in applying for leave; rather

there was no application for leave at all. The issue of leave was categorically raised by Ng in para 8 of his affidavit-in-reply in encl 49. A judgment, decree or order given or made in proceedings instituted or continued without leave under s 226(3)(a) of the Act must necessarily be void (*Keating v Graham* (1895) 26 OR 361; and *Howe v McDougall Ltd* (1939) 13 WCR (NSW) 33).

It is correct to say — and I so say — that applications for leave to begin or continue an action should be made inter partes. This is to enable service to be effected on the official receiver, who should be heard before the court exercises its discretion. As said there was no application for leave by Perdana to commence encl 44 and Miss Sitpah Selvaratnam confirmed that encl 44 was not served on the official receiver. She argued that an official receiver is often appointed as a liquidator and when the official receiver is the liquidator it has to be served on the official receiver. But she argued further and said that Campall has got its own private liquidator and therefore there was no necessity to serve encl 44 to the official receiver. Indeed Ng's role as a liquidator can never be questioned for he was duly appointed by the court. Ng was well represented by Mr Tan Chee Keong in these proceedings. In *Mosbert Bhd (In liquidation) v Stella D'Cruz* [1985] 2 MLJ 446 (SC), a private liquidator was not appointed and therefore there was a need for the official receiver to be present. Seah SCJ, delivering the judgment of the (then) Supreme Court had this to say on the issue of leave (at p 447):

> The question therefore arises whether 'leave of the court' should be obtained by way of: (a) an ex parte summons-in-chambers, or (b) inter partes summons. In *Re Western & Brazilian Telegraph Co v Bibby* (1880) 42 LT 821, Jessel MR was reported to have said that leave to commence an action against a company in liquidation should not be given on an ex parte application. No reason was given by the learned Master of the Rolls. But in our opinion, this practice of the court should be adopted and followed for these reasons, viz, it cannot be disputed that the primary object of winding up is the collection and distribution of the assets of the company pari passu amongst unsecured creditors after payment of preferential debts. And the purpose of the statutory provision is to ensure that all claims against the company in liquidation which can be determined by the cheap and summary procedure available in a winding up are not made the subject of expensive litigation. The provision is designed to prevent unnecessary multiplicity of suits which may result in dissipating the assets of the company. It is for this reason that application under s 226(3) of the Companies Act 1965 should be made inter partes so that the summons could be served on the Official Receiver who should be heard before the discretion of the court is exercised. Without hearing the Official Receiver, the court cannot be said to have exercised the discretion judicially.

Further down the same judgment in the same case, Seah SCJ continued (at the same page):

> In *Re Cuthbert Lead Smelting Co Ltd* (1886) WN 84, it was held that if the applicant could obtain all the relief in the winding-up, leave would be refused. In short, the court will always give an applicant leave if his claim cannot be dealt with adequately in the winding up or if the remedy he seeks

A cannot be given to him in a winding up proceeding. We think the learned judge had applied the correct test laid down in *Cuthbert*'s case and we agree with him that leave should be given pursuant to s 226(3) of the Companies Act 1965 to the respondent to commence proceedings against Mosbert Bhd (In liquidation) in respect of her claim to Private Lot No 460 in Johore Grant No 72 for Lot No 83 in the Mukim of Plentong in the District of B Johor Bahru.

It is germane, at this juncture, to examine some authorities on the subject matter of leave obtainable from the court.

In *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204, the Court of Appeal had to consider whether leave of the court was needed C before an action can be commenced against the liquidators who were officers of the court. Abu Mansor JCA, writing for the Court of Appeal, had this to say at p 207:

> At our resumed hearing, we struck off this appeal as we agreed with the learned judge that the motion, as such, in the first place, required the leave D of the court before it could be brought but not for the reason found by the judge. Firstly, we read the powers of liquidator in s 236(3) of the Companies Act 1965 ('the Act'):
>
> > 'The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or E proposed exercise of any of those powers.'
>
> We are of the view from the above provision, it is clear that a liquidator having been appointed by the court, is an officer of the court. It goes without saying leave of the court is needed before an action is commenced against him and officers like him.
>
> F We would cite the legal position of receivers who are in the same position as officers of court. In *The Law Relating to Receivers, Managers and Administrators* by Hubert Picarda at p 339, the learned author wrote:
>
> > 'A receiver, in the words of Viscount Haldane LC, "is an officer of the court put in to discharge certain duties prescribed by the order appointing him". ... He is "nothing more than the hand of the court" ... for the G purpose of holding the property of the litigants ... and the possession of the receiver is simply the possession of the court.'
>
> Then at p 373 of *Law of Receivers* by PS Atchuthen Pillai (2nd Ed), the author wrote in para 27:
>
> > 'Suit without leave is contempt of court and will be dismissed. A suit against a receiver when filed without leave of court is liable to be H dismissed ... .
> >
> > Institution of proceedings against a receiver without leave of the court is contempt of court. It is incompatible with the dignity and authority of the court to allow its officer to be summoned before any tribunal ... .'
>
> I As we have stated, we were unanimous that the applicant should have obtained leave before making his application below, for the attitude of a winding-up court has been that some form of leave is required.

Re Waterloo Life Insurance Co (No 2) (1862) 31 Beav 586 at p 589 established a vintage principle to the effect that after a winding-up order

had been made, further proceedings were absolutely stopped until leave has been obtained from the court. The object of s 446(1) of the Indian Companies Act 1956, which is equivalent to our s 226(3)(a) of the Act, has been described by A Ramaiya in the book entitled *Guide to the Companies Act* at p 2449 in these words:

> The object of winding up of a company by the court is to facilitate the protection and realization of its assets with a view to ensure an equitable distribution thereof among those entitled and to prevent the administration from being embarrassed by a general scramble among creditors and others. Consequently, once the court has taken the assets of a company under its control or has passed an order for it being wound up, it will not be proper to allow proceedings to be started or continued against the company and embarrass the administration of its affairs. The present action is intended to safeguard the assets of a company in winding up against wasteful or expensive litigation in regard to matters capable of being determined expeditiously and cheaply by the winding up court itself.

The case of *Deutsche Bank v SP Kala* (1990) 67 Com Case 474 at p 477 (Bom) which was affirmed by the case of sub-nom *Deutsche Bank v SP Kala* (1992) 74 Com Cases 577 (Bom-DB) laid down the principle that once a winding-up order was made, no proceeding can continue or be freshly commenced except by the leave of the court.

Dunn J in *Re Burnells Pty Ltd (In liquidation), ex p Brown and Burns (Liquidators); Burnells Pty Ltd (In liquidation) v Walsh* 4 ACLC, SC (Qld) 4 June 1979 at p 213 especially at p 214 said:

> In the course of the proceedings, the question arose whether the counterclaim was properly made, no leave having been obtained to make it against the company in liquidation, and it does seem that, if it were an appropriate case in which to counterclaim, then leave should have been obtained. In that regard, I simply refer to a short dissertation on the topic in Paterson and Ednie's *Australian Company Law* (2nd Ed) para 230/4. However, the counterclaim is subject to a much more substantial objection having regard to the circumstances that Walsh is perhaps a creditor and, it seems, a contributory of the company that is being wound up. In those circumstances, it appears to be the law — and I accept it as being the law — that the road to relief for an aggrieved creditor, be he secured or unsecured or a contributory, who wishes to challenge a decision of a liquidator is via either s 236(3) of our Companies Act or s 279 of the Act and in that regard the opinion which I have just expressed is supported by the cases, four of which are: *Leon v York-O-Matic Ltd & Ors* [1966] 1 WLR 1450; *Re Teller Home Furnishers Pty Ltd (In liquidation)* (1964) VR 313; *Re Mineral Securities (Australia) Ltd (In liquidation)* (1973) 2 NSWLR 207; and *Re Wyvern Developments* [1974] 1 WLR 1097. These being the circumstances, I order that the counterclaim be struck out.

In my judgment, the passages in the judgment of Dunn J, would equally apply to the facts of the present case. In filing encl 44 without leave of the court would render that enclosure to be struck out.

Buckley J sitting in the Chancery Division decided the case of *Eastern Holdings Establishment of Vaduz v Singer & Friedlander Ltd (Able Securities Ltd, In liquidation First Claimant; Sempah (Holdings) Ltd, Second Claimant)*

A [1967] 2 All ER 1192 on the issue of, inter alia, whether leave of the Companies Court was required for the issuance of interpleader summons. This was what his Lordship said at pp 1193–1194 of the report:

> The defendant makes no claim to the shares and submits to deal with them in whatever way the court thinks right to direct, and the question which has
B arisen is whether the interpleader summons is a proceeding against the company within the meaning of s 231 of the Companies Act 1948, which provides that when a winding-up order has been made, as is the case here in respect of the first claimant:
>
> > '... no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such
C terms as the court may impose.'
>
> 'The court' there means the court having jurisdiction to wind up the company, that is to say, the Companies' Court, not this court, the Chancery Division of the High Court.
>
> Counsel for the defendant, whose interpleader summons this is, has
D submitted that an interpleader summons is not a proceeding against the respondent to the summons at all. The party who seeks to interplead makes no claims against anyone and stands in a neutral position and merely asks to be protected against claims by others in respect of a subject matter to which the party seeking to interplead asserts no title at all. In *Re International Pulp and Paper Co Ltd* (1876) 3 Ch D 594, Sir George Jessel MR, dealing with s 87 of the Companies Act 1862, which is the predecessor and
E substantially, if not identically, in the same terms as the present s 231, said:
>
> > 'The words are general — "action, suit or other proceeding". Why should I limit them? Those who say that I am to impose a limit upon those general words must show a reason for my so doing.'

F Further down the same judgment of the same case, Buckley J continued in serious tone (at p 1195):

> As soon as this court had made such an order, it is manifest, I think, that proceedings would be on foot to which s 231 of the Companies Act 1948, would apply, for those would be proceedings against the company in liquidation. In that way, it would be impossible for anybody to proceed with
G those proceedings without leave of the court, in the face of s 231, and if the Companies Court should conclude that, for some reason or other, the proceedings, as constituted by the directions given in this court, were unsatisfactory in the Companies Court, it would be within its rights under s 231 to refuse leave to go on with those proceedings. I do not know what the attitude of the Companies Court would be, having regard to the respect
H which one branch of the High Court has for orders made in another branch of the High Court, but, technically at any rate, it would be within the power of the Companies Court to refuse leave to continue with the proceedings so set up by the Chancery Division by its order on this interpleader summons.

I In *Daemar & Anor v Opeskin & Ors* (1985) 3 ACLC 743, it was held that leave of the court was required to commence an action against a company in liquidation. Needham J remarked as follows:

> As I have already said, the first defendant was put on notice of the provisions of s 371(2) of the Code on 12 August 1985. Her legal advisers, far from attempting to repair the omission to obtain the Court's leave, deliberately

sought to hide that omission from the magistrate and, in the circumstances I have already outlined, took advantage of the plaintiff's absence to obtain an order ex parte. A

That conduct, in my opinion, would debar the first defendant from the exercise of the court's discretion to grant leave to put the execution in force, but, even if that consideration be placed aside, the first defendant has not shown any special circumstances. B

In *Seymour & Anor v Southern Districts Video Pty Ltd (In liquidation)* (1985) 3 ACLC 420, the Australian High Court had to construe sub-s 401 (2) of the Companies (Western Australia) Code ('the Code') which was worded in this way:

C

> After the commencement of the winding up, no action or other civil proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.

Toohey J delivered the judgment of the court and his Lordship had this to say (at p 423): D

> Subsection 401(2) of the Code is a law relating to procedure and, except as otherwise provided by the laws of the Commonwealth, it is binding on courts exercising federal jurisdiction. The subsection is expressed in general terms, so far as the prohibition is concerned, in that it strikes at all actions and other civil proceedings. It may seem curious that the leave of the Supreme Court is required to commence proceedings in the Federal Court or to continue such proceedings. But that is the result of federal legislation, not of State legislation. E

I pause here to say that if there was an application for leave in filing encl 44, which was not the case here, I need to consider the balance of convenience in determining whether leave to proceed should be granted. In *Century Mercantile Co v Auckland Provincial Fruitgrowers Society* (1921) NZLR 272, the court stated that: F

> The only material question to be considered is whether there are any circumstances which render it necessary that the action should be continued, or whether the claim of the plaintiff is not one which can be as easily dealt with in the winding up as in any other way. G

It is apparent that the question posed here is fundamentally one of expedience and convenience (*Re Queensland Mercantile Agency Co* (1888) 58 LT 878; *Stewart v Intercity Distributors Ltd* (1960) NZLR 944; *Maker v Taylor* (1984) 8 ACLR 931). The court will also examine the amount and seriousness of the claim, the degree of complexity of the legal and factual issues involved, and the stage which the proceedings have reached before deciding that leave should be given: *Ogilvie-Grant v East* (1983) 1 ACLC 742. H

Be that as it may, Miss Sitpah Selvaratnam for Perdana sought to emphasize that encl 44 was filed before the same court that ordered Campall to be wound up. Some four years ago, she said, this very court ordered Campall to be wound up and they are now coming back to the same court and not to another or different court. She said that Ng as the I

liquidator was not sued in encl 44. It was her submission that Campall was under liquidation and this court has control and custody of Campall. Ng as an officer of this court was appointed as the liquidator to handle the day to day management of the winding up for this court. Therefore, she submitted that it stands to reason that if there is a dispute in the winding-up of Campall, the parties must return to this court to have the issues resolved. It was argued that if leave of the court was required then it should be the leave of this court for Perdana to proceed in another court against either Ng the liquidator or Campall. But it was pointed that Perdana was not interested in pursuing a separate action. An argument was advanced to show that encl 44 was not a separate action but was an action filed in the same winding-up court that ordered Campall to be wound up. Separate actions were said to have been commenced in *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* and in *Boulton v Nathan Nominees Pty Ltd & Anor* (1992) 10 ACLC 1102. The facts briefly in *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* were these. The applicant there had rented certain premises to Rich's Supercentre Sdn Bhd ('the company'). Upon winding-up of the company, the applicant applied by way of originating motion for arrears of rent from the liquidator. The trial judge found that the originating motion was filed after the winding up order was made by the court. By virtue of s 226(3) of the Act, leave of the court was required before commencing the action. As no leave had been obtained, the originating motion was struck out. The applicant appealed on the issue whether leave of court was indeed necessary before commencing the action since the originating motion was against the liquidator personally. On these facts, it was held that according to s 236(3) of the Act, a liquidator appointed by the court was considered an officer of the court and leave of the court was needed before an action can be commenced against him. It was further held that the application should have been made under s 305 of the Act as the claim against the liquidator in the course of winding up came under s 305 and not s 226(3) of the Act. Nevertheless, the court held that the applicant should have first obtained authority from the winding-up judge before proceeding against the liquidator. In *Boulton*'s case, the plaintiff sought a declaration that a charge given to it by Boulton Factors (NSW) Pty Ltd ('Boulton Factors') ranked pari passu with a charge given to the first defendant. Boulton Factors was in the course of being wound up by the court. It seemed that the plaintiff had joined Boulton Factors' liquidator personally, and not Boulton Factors, as a defendant in the proceedings. An order was sought directing the liquidator to make provision for the plaintiff's claim. It was held that the proceedings could not be brought against the liquidator. McLelland J at p 1103 of the report had this to say:

> Proceedings cannot properly be brought against a court-appointed liquidator personally except by application in the winding up proceedings themselves, or pursuant to leave of the court granted in an application made in the winding up proceedings (see *Re Siromath Pty Ltd* (1991) 1580 and *Re Siromath Pty Ltd (No 3)* (1991) 9 ACLC 1587).
>
> The present proceedings are brought independently of the winding-up proceedings and no leave of the court has been obtained to sue the liquidator

personally. There are two ways in which that procedural difficulty can be rectified or could have been avoided. The plaintiff, who is a creditor of Boulton Factors, could have made an application by notice of motion in the winding up proceedings, joining the liquidator and the present first defendant as respondents to that application, for the determination of the question at issue, which is a question in the winding up of Boulton Factors, and which the court would have inherent jurisdiction to determine summarily in the winding up proceedings (see *Re Gapes Interstate Transport Pty Ltd* (1970) 92 WN (NSW) 169 and *Re Reid Murray Holdings Pty Ltd* (1969) VR 315). Alternatively, the plaintiff could have brought, and can by amendment reconstitute the present proceedings as, a suit joining as a defendant Boulton Factors and omitting its liquidator as a defendant. In proceedings so reconstituted, the question of substance can be determined as between the relevant parties. That would of course require the leave of the court to be obtained to the bringing of proceedings against Boulton Factors, since it is in liquidation.

Both *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* and *Boulton's* case revolved on the issue of whether proceedings could be brought against a court-appointed liquidator without leave of the court. In the present case, Miss Sitpah Selvaratnam took pains in pointing out that the notice of motion in encl 44 was not against Ng — the liquidator — but rather against Campall. But Campall was wound up on 20 March 1993 and Ng was appointed by the winding-up court as the duly appointed liquidator. Prayers (1), (2), (3), (4), (5) and (6) of encl 44 were drafted in such a fashion as to emphasize the role of Campall without taking into account the undisputed fact that Ng had since been appointed as the liquidator to manage the daily affairs of Campall. On perusal of the prayers in encl 44, an inescapable conclusion would be arrived at that that enclosure was designed solely to tie the liquidator to Perdana. It was in fact a proceeding against the liquidator after Campall had been wound up — a proceeding that proceeded without leave of this court notwithstanding the fact that this was the winding-up court that wound up Campall. As I said earlier on 22 January 1994, James Foong J ordered that the proceeds of sale of the immovable property and the machinery to be paid to the liquidator of Campall for its placement in an interest bearing fixed deposit account to be maintained by the liquidator until further order of the court on the priority of distribution. It was argued by Miss Sitpah Selvaratnam that the time has come for this court to make an order on the priority of distribution and it was for this reason that encl 44 was filed. This argument brings to the forefront the issue of prematureness of filing encl 44.

Premature to file encl 44 and other inter-related issues

Ng as the duly appointed liquidator was said to be under a statutory duty to perform within the purview and ambit of s 233 of the Act. That section relates to the custody and vesting of the company's property. Subsections (1) and (2) of s 233 of the Act are very material and for clarity they are now reproduced hereinunder:

(1) Where a winding up order has been made or a provisional liquidator has been appointed, the liquidator or provisional liquidator shall take

into his custody or under his control all the property and things in action to which the company is or appears to be entitled.

(2) The Court may, on the application of the liquidator, by order direct that all or any part of the property of whatsoever description belonging to the company or held by trustees on its behalf shall vest in the liquidator and thereupon the property to which the order relates shall vest accordingly and the liquidator may, after giving such indemnity, if any, as the Court directs, bring or defend any action or other legal proceeding which relates to that property or which it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property.

Ng, as the court-appointed liquidator shall 'take into his custody or under his control all the property and things in action to which' Campall was or appeared to be entitled. That would be a job that demands some measure of responsibility for the simple reason that should Ng default, he would be accountable and liable personally for costs (*Kumarasamy v Hj Daud* [1972] 2 MLJ 16; *Markcon Sdn Bhd v Resilient Construction Sdn Bhd* [1993] 3 MLJ 429 and *Bensa Sdn Bhd v Malayan Banking Bhd* [1993] 1 MLJ 119). All Ng need do as a court-appointed liquidator was to act bona fide and if he reasonably formed an opinion that carrying on business under s 236(1)(a) of the Act was necessary for the beneficial winding up of Campall, he will not be penalized if proved wrong: *Re Great Eastern Electric Co* [1941] 1 All ER 409. On compromises as envisaged under s 236(1)(c) of the Act, Ng as a court-appointed liquidator cannot compel apathetic creditors to accept a compromise and if their consent is not obtained, the court will be slow to sanction a proposal: *Re Trix Ltd* [1970] 3 All ER 397. If a situation of this nature were to arise, Ng should resort to a scheme of arrangement under s 176 or s 273 of the Act to control and compel dissentient minorities. Speaking generally, Ng as an officer of the court (*Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204) must maintain an even and impartial hand between all the individuals whose interests are involved in the winding up. It is Ng's duty to make himself thoroughly acquainted with the affairs of Campall for the benefit of the whole body of creditors, the whole body of shareholders and even to the court. Ng must not suppress or conceal anything which comes to his knowledge in the course of his investigation which is material to ascertain the exact depth and truth of the matter. Ng must be meticulous and it is for the judge to see that he does his duty in this respect and towards that direction (*Gooch's case* (1872) 7 Ch App 207).

The powers of Ng as the liquidator are amply set out in s 236 of the Act. It was argued that Ng had not completed his assignment. It was the argument of Mr Tan Chee Keong that Ng must tidy up the affairs of Campall and then decide to distribute under ss 292 or 293 of the Act. It was emphasized that the prematureness of encl 44 could readily be seen and made more pronounced when one considers that certain things had not been done by Ng. Ng was said to be waiting for feedback with regard to income tax, Socso and EPF. Mr Tan Chee Keong argued that Ng was performing a thankless job and after he has performed his statutory duties,

the provisions of s 236(3) of the Act would be activated. Section 292(1)(f) of the Act reads as follows:

> (1) Subject to this Act, in a winding up there shall be paid in priority to all other unsecured debts
>
> ...
>
> (f) sixthly, the amount of all federal tax assessed under any written law before the date of the commencement of the winding up or assessed at any time before the time fixed for the proving of debts has expired.

and it is clear beyond doubt that federal taxes take the front seat. Priority was rightly given by Ng to federal taxes. Section 10 of the Government Proceedings Act 1956 speaks of federal taxes taking priority over subsequent debts (*Anuarul Aini v Ketua Pengarah Kastam dan Eksais Diraja Malaysia* [1991] 1 MLJ 360 and *Global Pacific Textile Industries Sdn Bhd v Ketua Pengarah Kastam dan Eksais* [1994] 3 MLJ 175). Perhaps it is not out of place to set out s 75(2) of the Income Tax Act 1967 which reads as follows:

> (2) The liquidator of a company which is being wound up shall not distribute any of the assets of the company to its shareholders unless he has made provision (in so far as he is able to do so out of the assets of the company) for the payment in full of any tax which he knows or might reasonably expect to be payable by the company under this Act or to be deductible by the company under section 107.

Section 75(3) of the Income Tax Act 1967 sets out the penal liability of a liquidator and it is worded thus:

> (3) Any liquidator who fails to comply with subsection (2) shall be liable to pay a penalty equal to the amount of the tax to which the failure relates.

It is interesting to note that the (then) Supreme Court in the case of *Raja Arshad bin Raja Tun Uda & Anor v Director-General of Inland Revenue* [1990] 1 MLJ 106 ruled that in a winding up, federal tax ranked sixth as federal debt under s 292(1)(f) of the Act and ordered that the Director-General of Inland Revenue was entitled to the sum of RM105,461.84 being the amount of tax payable on the disposal of the landed property.

On EPF, reference may be made to *Chuah Teong Hooi & Anor v Employees Provident Fund Board* [1990] 2 MLJ 218 where Wan Adnan J (now FCJ) ruled that EPF took priority over the costs, charges and expenses incurred by the receivers and managers. Briefly, the facts were that the plaintiffs who were the receivers and managers of two companies appointed pursuant to certain debentures granted by the companies applied to the court pursuant to s 183(3) of the Act for directions as regards the priority of the claim by the plaintiffs for the costs, charges and expenses incurred by them and the claims by the defendant for payment of the employer's and employees' contributions under s 7(1) of the Employees Provident Fund Act 1991. Wan Adnan J (now FCJ) had this to say (at p 220):

> Under s 7(1) of the EPF Act every employee and every employer of a person shall be liable to pay monthly contributions at the rate set out in the Third

Schedule to the EPF Act and in s 8(1) it is provided that the employer shall, in the first instance, be liable to pay both the contributions payable by himself and also the contributions by the employee. Under s 10, the employer can recover from the employee the amount of the employee's contribution by means of deduction from the wages due to the employee. Section 11 makes the employer liable to pay interest if the contributions payable are not paid within the prescribed period. Under s 16A(c) it is an offence if an employer fails within the prescribed period to pay the monthly contributions. Whenever any property of an employer is sold under s 17A of the EPF Act, the proceeds of the sale may be distributed only after provision has been made for the payment of contributions payable by the employer.

The EPF Act makes it obligatory upon the employer to pay first the monthly contributions payable by himself and by the employee. It is an offence if he fails to do so. So far as the EPF is concerned, it is the employer who must pay both the contributions. Whether or not he wants to or is able or unable to recover from the employee the contributions which he pays on behalf of the employee is no concern of the EPF. The liability to pay is on the employer.

Finally, in another part of the judgment in the same case Wan Adnan J (now FCJ) said (at the same page):

> It is therefore my view that notwithstanding the provisions of the Companies Act 1965, the EPF claims take priority over the claims of the plaintiffs for their cost and expenses.

Again on the issue of EPF, reference may also be made to the case of *Global Pacific Textile Industries Sdn Bhd (In receivership) v Ketua Pengarah Jabatan Kastam dan Eksais & Ors* [1994] 3 MLJ 175 where Wan Adnan J (now FCJ) gave EPF contributions priority over the sales tax and customs duties which ranked pari passu between them, and lastly the debenture holders. The headnote of that case merits reproduction. It reads as follows:

> (1) By virtue of s 10 of the Government Proceedings Act 1956, customs duties and the sales tax have priority over the claims by the debenture holders and the receivers for their costs and expenses. The EPF contributions also have priority over the debenture holders and the receivers.

In construing s 292 of the Act, this was what Peh Swee Chin J (now FCJ) said in *Re Golden Palace Musical Hall Sdn Bhd* [1988] 2 MLJ 634 (at p 635):

> It will be noticed that a federal tax mentioned in s 292, though at the bottom of the order of priority, is a preferential debt in a winding up, and could have ex facie enjoyed priority over a claim for principal and interest due in respect of a debenture as s 191 expressly states that the list of preferential debts in s 292 should be implemented before such claim for such principal and interest of a debenture holder.

An argument was advanced that in discharging his statutory duties, Ng must take under his control all the assets of Campall and this exercise was said to be time consuming as he had to go through all the documents and see the relevant creditors and debtors. In short, Ng must collect all the assets before he could even dream of distributing them. It was argued that

encl 44 was tantamount to 'hijacking' not only the assets of Campall but also the duties of Campall. The distribution of the assets of Campall was said to be provided for under the Companies (Winding-Up) Rules 1972. Enclosure 44 was said to be designed solely to stifle the powers of Ng as the liquidator.

Miss Sitpah Selvaratnam took pains in highlighting in some detail the chequered history of the case and she impressed upon this court that encl 44 was timely as disputes had arisen between Perdana and Ng. It was her stand that encl 44 was filed pursuant to the order of James Foong J where his Lordship had ordered that the question of priority to be settled by the court should a dispute arose. It was also her stand that Ng procrastinated in seeking an order of this court on the issue of priority of the distribution of assets and it was for this reason that Perdana filed encl 44. It was wrong for Miss Sitpah Selvaratnam to say that there was no assurance by Ng in any of the affidavits filed therein that he would seek the direction of the court for disposal of the assets. In fact, encl 51 para 33 of Ng's further affidavit-in-reply was quite categorical that Ng would refer the matter to court when he was ready.

In regard to encl 44, Ng made his feelings known to all and sundry. In encl 51, Ng categorically stated that encl 44 was premature, frivolous and vexatious in view of the fact that he had not completed his assignment as a court-appointed liquidator nor discharged his statutory duties under s 236(2) of the Act. Ng too stated in encl 51 that the income tax department had not advised him as to the tax liabilities of Campall. It was deposed that income tax was also payable and leviable on the interests earned from monies placed in fixed deposits and Ng as the court-appointed liquidator should be given the duty of paying those taxes as it was he who had obtained the additional monies for distribution. It is significant to note that under s 4(c) of the Income Tax Act 1967 the income upon which tax is chargeable is income in respect of, inter alia, interest that accrued. Ng too took the stand as reflected in encl 51 that the notice of motion in encl 44 was tantamount to harassment and unlawful interference of Ng's statutory duties as an officer of the court. In regard to the remuneration of the liquidator, it was deposed that encl 44 was filed with an ulterior motive of pressurizing Ng and to deny him of his rightful remuneration package under the scale of fees as prescribed by the Companies (Winding-Up) Rules 1972. Way back in 1870 in the case of *Re Massey; Re Freehold Land & Brickmaking Co* (1870) LR 9 Eq 367, it was held that an official liquidator was not entitled to receive anything out of the assets of a company by way of remuneration until all the costs of the winding-up (including the bill of costs of the solicitor employed by him) have been paid in full. Lord Romilly MR had this to say:

> In the absence of any special agreement, I consider that these costs are to be paid according to law; and the rule of the court is this, that in the first place the costs of the petition for winding-up are to be paid out of the assets, next the costs of the winding up, and then the remuneration of the official liquidator; but no remuneration can be given until all the costs of the winding-up are paid, including the costs of any provisional liquidator who may have been properly appointed.

In *Nationwide News Pty Ltd v Samalot Enterprises Pty Ltd* (1986) 4 ACLC 386, it was held that s 373 of the Companies (New South Wales) Code conferred on a liquidator a statutory entitlement to remuneration and conferred on the court a statutory power to determine that remuneration, neither of which were dependent upon the continued subsistence of the order appointing the liquidator but rather upon the liquidator's status as such. It was also held that a liquidator or provisional liquidator who are entitled to remuneration would normally have an equitable lien over the assets under his administration to secure payment of that entitlement as well as his expenses, analogous to the lien to which a court-appointed receiver was entitled. That lien was said to be subsisting and would survive the termination of his appointment.

Perdana held the view that an approximate sum of RM21,366.83 was payable to Ng as his remuneration.

Ng relied on the committee of inspection's recommendations and sought for remuneration at RM177,232.83. Rule 142(1) of the Companies (Winding-Up) Rules 1972 states that:

> (1) The remuneration of a liquidator, unless the Court shall otherwise order, shall be fixed by the committee of inspection, and shall be in the nature of a commission or percentage of which one part shall be payable on the amount realized, after deducting the sums (if any) paid to secured creditors (other than debenture holders) out of the proceeds of their securities, and the other part on the amount distributed in dividend.

It must be borne in mind that the constitution and proceedings of the committee of inspection are amply set out in s 242 of the Act. Emphasis should be placed on sub-s (1) thereof which enacts that:

> (1) The committee of inspection shall consist of creditors and contributories of the company or persons holding —
>
> (a) general powers of attorney from creditors or contributories; or
>
> (b) special authorities from creditors or contributories authorizing the persons named therein to act on such a committee,
>
> appointed by the meetings of creditors and contributories in such proportions as are agreed or in a case of difference as are determined by the Court.

Rule 142(1) of the Companies (Winding-Up) Rules 1972 clearly gives authority to the committee of inspection, statutorily constituted, to fix Ng's remuneration. This was my judgment and I so hold accordingly. Ng was entitled to the remuneration of RM177,232.83. The prevailing views in regard to remuneration of liquidators can compendiously be stated thus:

(1) Speaking generally, a liquidator is entitled to a reasonable remuneration for his services in winding up the company as reflected in the case of *Re Wm Rose & Co* (1897) 3 ALR (CN) 65.

(2) Prima facie the liquidator is not entitled to be paid until the liquidation is completed to the core: *Re New Zealand Times Co* (1941) NZLR 677.

(3) If the winding-up exercise is unduly protracted, the liquidator may apply from time to time to the court to sanction payments provided

evidence is led to show the actual work done up to the date of the application (*Re Kling Constructions Ltd* (1961) QWN 30; *Niemann v Commissioner for Corporate Affairs* (1985) VR 147 and *Re Crawford (as liquidator of Action Waste Collections Pty Ltd) (In liquidation) v Greater Pacific General Insurance* (1983) ACLC 518).

(4) Three instances exist where the liquidator may lose his remunerations. Firstly, when he is deprived of his remuneration on the ground of misconduct. Secondly, where the assets are insufficient to meet his remuneration (*Re Massey; Re Freehold Land & Brickmaking Co* (1870) LR 9 Eq 367 and *Re Sanitary Burial Association* [1900] 2 Ch 289). Thirdly, where his appointment is defective (*Re Allison Johnson & Foster Ltd* [1904] 2 KB 327 (CA) as applied in *Re Kyra Nominees Pty Ltd* (1980) 5 ACLR 60).

For the reasons adumbrated above, I allowed the preliminary objections advanced by Mr Tan Chee Keong with costs. A consequential order was also made to strike out encl 44 forthwith.

Preliminary objection allowed.

Reported by Lim Kuan Yew